IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,

Appellant,

v.

CLINTON E. FOSTER, As Prosecuting Attorney of Bay County, Florida; M.J. "DOC" DAFFIN, as Sheriff of Bay County, Florida; and THE HONORABLE W. L. FITZPATRICK, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida,

Appellee.

On Appeal from the United States District Court for the Northern District of Florida Pensacola Division

BRIEF FOR THE STATE OF NEW JERSEY *AMICUS CURIAE*

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On Appeal from the United States District Court for the Northern District of Florida Pensacola Division

MOTION TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of New Jersey respectfully moves for leave to file out of time the within brief, *amicus curiae* in this case.

The State of Florida, subsequent to the filing of its brief with this Court, requested the State of New Jersey to join as *amicus curiae*. Since that time the *amicus* has been preparing its brief for submission to this Court.

The *amicus* has a special interest in the disposition of this case, because it involves the validity of the position previously taken by the United States Court of Appeals for the Third Circuit on the question of whether the Civil Rights Act, 42 U.S.C. §1983, is an exception to the Anti-Injunction Act, 28 U.S.C. §2283. It is submitted that the Third Circuit's position is erroneous and that a decision on the matter by this Court is needed in the interest of the orderly administration of criminal justice.

For this reason the *amicus* respectfully requests this Court to grant its motion to file this brief out of time.

Respectfully submitted,

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Dated: December 2, 1971.

Statement of Interest of the *Amicus Curiae*

The State of New Jersey, *amicus curiae*, by its Attorney General, respectfully submits this brief in the above-captioned appeal in support of the position of appellees.

The interest of the *amicus* in this appeal arises from the view which appears to have currency only in the Third Circuit, to wit, that Title 42 U.S.C. §1983 (the Civil Rights Act) is an exception to the general proscription against enjoining pending state proceedings found in the Anti-Injunction Act, 28 U.S.C. §2283. Because of this view, which the *amicus* regards as erroneous, the *amicus* has been forced to engage in protracted litigation, albeit successfully, in defense of duly instituted state proceedings.

It now appears in light of *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng.*, 398 U. S. 281 (1970) and *Younger* v. *Harris*, 401 U. S. 37 (1971) that in every instance where the Third Circuit has entertained an action to enjoin proceedings in the state courts of New Jersey, *e.g.*, *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3d Cir. 1950) and *DeVita* v. *Sills*, 422 F. 2d 1172 (3d Cir. 1970), that court failed to recognize that the proper threshold inquiry was whether plaintiff was able to show those elements which courts of equity have been traditionally required to find in order to intercede in pending proceedings in another court. In the Third Circuit's view, the key to finding whether such actions could be entertained revolved around the question of whether §1983 fell into the express authorization exception to the Anti-Injunction Act.

In both *Cooper* v. *Hutchinson* and *DeVita*, plaintiffs were ultimately denied relief under the "abstention doctrine"; in effect the court recognized that an adequate remedy at law was available in the state courts. How-

ever, in the interim state court proceedings were disrupted and the State was required to expend considerable resources in defense of claims ultimately found to be lacking in equity.

It is the view of the *amicus* that a proper recognition by the Third Circuit of the particularized remedial ambitions of the Civil Rights Act, even apart from its failure to treat the equitable considerations as the proper threshold inquiry, should have led to summary dismissals in both of these cases. It is for this reason that the *amicus* submits this brief in support of appellee's position.

ARGUMENT

POINT I

The notion that 42 U.S.C. §1983 falls within the "express authorization" exception of the Anti-Injunction Act, 28 U.S.C. §2283, is at odds with the historical conception of the Civil Rights Act as well as the plain language of the Anti-Injunction Act and the case law interpreting that act.

The conclusion that the Civil Rights Act, 42 U.S.C. §1983, must fall within the purview of the general proscription of the Anti-Injunction Act, 28 U.S.C. §2283, rather than any of the stated exceptions to that Act, is mandated by examination of the very special remedial ambitions Congress had in mind in enacting the Civil Rights Act. It is widely acknowledged that:

> The distinguishing characteristic of the wrongs prompting the statute [42 U.S.C. §1983] was that they were directed not so much against individuals

> as against persons because they shared characteristics defining a class. Note, "Limiting Section 1983 in the Wake of Monroe v. Pape," 82 *Harv. L. Rev.* 1486, at 1495 (1969).

This commentator likewise observed that throughout the legislative history of the Civil Rights Act the focus was upon class deprivations, not individual torts. *Ibid.*

In *Younger* v. *Harris*, *supra*, the Court provided a précis of the general province of federal equity courts to interpose themselves in pending state proceedings, *i.e.*, instances where:

> ". . . the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* 91 S. Ct., at 751.

This declaration nurtures a critical distinction germinated in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). At first blush the *Dombrowski* decision would appear to lend credence to the notion that 42 U.S.C. §1983 did in fact embody a policy decision to permit the enjoining of pending state criminal proceedings in cases involving allegations of deprivation of federal rights.

However, *Younger* may be seen as having recognized that in *Dombrowski* it was not the threat or reality of prosecution which furnished a basis for federal equitable relief. Indeed, if this had been the problem in *Dombrowski*, it could have been adequately dealt with in a "single criminal prosecution." *Id.*, 91 S. Ct., at 751. State courts are constitutionally bound to enforce such federally protected rights. *Testa* v. *Katt*, 330 U. S. 386 (1947). Moreover, the Court has recognized the adequacy of state enforcement if complete relief is available within the sub-

sisting state proceeding. *Atlantic Coast Line R. Co., supra,* 398 U. S. at 297.

The need for federal equitable relief in *Dombrowski* was to provide a remedy for those deprivations which could not be dealt with and requited in any contemplated state proceeding. The notion of "chilling effect" on First Amendment rights given currency in *Dombrowski* may be seen as one species of deprivation not amenable to relief in a state court of law. The contours of that deprivation extended far beyond the individual plaintiff's own interests.

Relief in a *Dombrowski* situation clearly would not be affected were this Court to declare that §1983 does not fall within a specific exception to the Anti-Injunction Act. The problem arises in cases such as the present one and in cases such as *Cooper* v. *Hutchinson* and *DeVita* v. *Sills, supra,* where the plaintiffs sought to employ the Civil Rights Act as a springboard to pursue particular and individualized relief in what was thought by them to be the more hospitable atmosphere of the federal forum.

Unlike the *Dombrowski* situation, *Cooper* and *DeVita* are typical of the situations in which the question of §1983, as an exception to the Anti-Injunction Act has significance. Stripped of rhetorical flourish, all of these cases seem to reduce to instances where one or several plaintiffs are seeking to create a barrier between themselves and the success of pending state proceedings against them.

In a situation such as *Dombrowski* the plaintiff seeks to do something more, that is, he seeks in asserting his federally protected rights to protect interests that are actually broader than those implicated and "threatened"

by state proceedings. Such interests, to the extent that they fall outside the embrace of prosecution, may be protected by injunctive relief without creating an interference with the state proceeding. See *Lewis* v. *Kugler*, —— F. 2d ——, Civ. No. 71-1227 (3d Cir. 1971) (slip op. 10-11), *cf. Dombrowski, supra* 380 U. S. at 485-486.

Similarly, if rights have been transgressed but there is no pending state proceeding the plaintiff does not have the opportunity to be made whole in the state court. The doctrine of *Monroe* v. *Pape*, 365 U. S. 167 (1961), that an action for damages under §1983 is a supplemental remedy to that available in the state court, recognizes that particularly where the only pending state proceeding is criminal, the state forum does not stand ready to make the plaintiff whole in money damages under a tort theory. Thus, to award damages in such a case leads to no interference or "short circuiting".

On the other hand, *Younger, supra*, 91 S. Ct. at 755-756 (concurring opinion) (footnote) and *Atlantic Coast Line R. Co., supra*, make clear that in a case where abstention would previously have not been required, i.e., where the federal court felt the state courts had wrongly decided a federal question and would decide the same question wrongly against plaintiff, the federal court may no longer enjoin a pending state prosecution. See *Karp* v. *Collins*, 310 F. Supp. 627 (D.N.J. 1970), *vacated and remanded for reconsideration in light of Younger* v. *Harris, sub. nom. Kugler* v. *Karp*, 91 S. Ct. 933 (1971), *dismissed* —— F. Supp. —— (D.N.J. 1971).

Aside from a case of this type, there does not appear to be any other situation where the availability of relief would actually depend on finding that §1983 is an exception to §2283. The reason for this is apparent:

it appears that relief could not be forthcoming in the other situations in which jurisdiction might hinge exclusively on the acceptance of §1983 as an exception: (a) in a case presenting a federal question not previously resolved in the state courts, arising out of pending state action, the abstention doctrine would bar resolution of the question by the federal court; (b) in a case presenting a federal question previously decided "correctly" by the state courts, i.e., in a manner favorable to the plaintiff, there would be no need for federal intervention and the federal court would likewise abstain. In other words, there does not appear to be any situation where relief on the merits could follow an invocation of jurisdiction based solely on §1983.

Hence, from a practical standpoint, it can hardly be said that the efficacy of 42 U.S.C. §1983 is in any way dependent upon a recognition that that provision provides an exception to the general proscription of the Anti-Injunction Act. Therefore, there is no realistic basis for contending that failure to recognize the Civil Rights Act as an exception to that proscription would be incompatible with Congress's intention in passing that Act.

Viewed another way, it seems that in every instance where the question of §1983 as an exception would loom as critical, i.e., where the relief sought is no broader than the individual plaintiff, or plaintiffs' avoidance of the possibility of a judgment of conviction in a state prosecution, the threshold requirement for invoking federal equity jurisdiction (an inability to remove a "threat" to federally protected rights) would be absent. Thus, in actuality entertaining such an action on the basis of §1983 would involve a disregard of the prerequisites to entertaining an action under the stated exceptions or under the "irreparable injury" exception. *Younger, supra,* 91 S. Ct. at 750. This would be untenable.

In other areas it appears that in every instance where federal courts have recognized exceptions to the general proscription of the Anti-Injunction Act, apart from the stated exceptions, such exceptions have been rationalized on the basis that they arose out of subsequent acts of Congress specifically authorizing particular injunctive relief which specific authorizations would be rendered nugatory were they to be limited by the general proscription of the Anti-Injunction Act. See *Baines* v. *City of Danville,* 337 F.2d 579, 587 (1964) *cert.* denied *sub. nom. Chase* v. *McCain,* 381 U.S. 939 (1965). Recently this Court repudiated most of these "implied" judicial exceptions except in those few cases where to not recognize such exceptions would amount to a virtual abandonment of the legislation in question. *Atlantic Coast Line R. Co., supra,* 398 U. S. at 287.

Toucey v. *New York Life Insurance Company,* 314 U.S. 118 (1941) may be regarded as a seminal case in this area. There it was held that the lower federal courts could not enjoin the relitigation in the state court of issues fully litigated in the federal courts. In reaching this decision, Mr. Justice Frankfurter for the Court found that most exceptions to the Anti-Injunction Act were necessarily inferred from other federal legislation. The exceptions were listed: the bankruptcy exception; the interpleader exception arising from the Interpleader Act of 1826; the removal exception emanating from the removal acts of 1789; the limitation of ship owners liability resulting from an 1851 statute; and the exception created by the Frazier-Lemke Act.

Porter v. *Dicken,* 328 U.S. 253 (1946) recognized the creation of another statutory exception in the Emergency Price Control Act of 1942. This case represents

the sole instance wherein this Court has held that a general cause of action for an injunction could be construed as an exception to the Anti-Injunction Act. Because of the particular exigencies prompting the passage of the Price Control Act of 1942 as well as the peculiar facts of the *Porter* case and the subsequent revision of 28 U.S.C. §2283 in 1948, *Porter* offers no support for the proposition that a grant of general equitable jurisdiction thereby constitutes an exception to §2283. Indeed, the fact that *Porter* was clearly based on the *sui generis* nature of the price control problem militates in favor of the conclusion that in the case of less particularized federal legislation such general grants are not to be construed to constitute an exception to §2283. Moreover, in *Porter,* the moving party was in actuality the United States, for whom a special rule has developed, see *infra.*

In 1948 the terms of the Anti-Injunction Act were recast in a form which survives to this day. At that time Congress added the phrase, "except as expressly authorized by Congress" replacing the only exception obtained in the earlier formulation (dealing with bankruptcy matters). The revisor's note indicates that this change was designed to continue the bankruptcy exception, as well as to recognize other statutory exceptions which Congress had accomplished without expressly amending the Act, and provide for further exceptions which Congress might specifically authorize in the future. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A 181. In this configuration the Act has been strictly construed by this Court. *Atlantic Coast Line R. Co., supra* 398 U.S. at 297.

Thus, in *Amalgamated Clothing Workers v. Richmond Bros.,* 348 U.S. 511 (1955), the Court stated that the revision of 1948 "made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisa-

tion." *Id.* 348 U.S., at 514. The thrust of *Amalgamated Clothing Workers* was clear. The Court would recognize no judicially implied exceptions to the revised Anti-Injunction Act although decisions under the earlier formulation had at least payed lip-service to a welter of such exceptions.

Leiter Minerals v. *United States*, 353 U.S. 220 (1957) represents no departure from *Amalgamated Clothing Workers, supra.* Of particular pertinence to this discussion was the fact that the gravamen of *Leiter Minerals* was the distinction drawn between threats of irreparable injury to the national welfare, *i.e.*, where the United States was the moving party, as opposed to situations in which the collision of the Anti-Injunction Act with 42 U.S.C. §1983 inevitably occurs, that is, where individual plaintiffs seek to litigate defenses to state court proceedings in the federal forum.

The latest chapter in the history of the Anti-Injunction Act was written by this Court in *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Eng., supra.* Therein, this Court again took great pains to point out the stringency with which §2283 is to be applied by the federal courts. The Court rejected the notion that the "clear cut" statutory prohibition of §2283 was merely an admonitory declaration of the principle of comity. The Court found that section to be "a binding rule on the power of the federal courts," not to be avoided even though the state proceedings in question might "interfere with a protected federal right." *Id.*, 398 U.S. at 287, 294.

Echoing its earlier statement in *Amalgamated Clothing Workers, supra,* the Court stated in *Atlantic Coast Line R. Co., supra*:

> ". . . any injunction against a state court proceeding otherwise proper must be based on one of the specific exceptions to §2283 if it is to be upheld . . . [T]he exceptions should not be enlarged by loose statutory construction." *Id.*, 398 U.S. at 287.

Thus, "expressly authorized by act of Congress" means authorized in "black and white" by literal terms of the statute. There is no such literal authorization in 42 U.S.C. §1983. This fact alone would militate against a finding that the Civil Rights Act falls within the "expressly authorized" exception.

It should be noted that on several occasions since 1948, Congress has legislated in the field of civil rights but has not seen fit to alter the language of §1983 to incorporate language of explicit authorization. While Congress has expanded the frontiers of civil rights legislation it has done so in a manner consistent with the original group-oriented conception of the law with a particular focus on the area of racial, religious and ethnic discrimination. To have modified §1983 so as to provide an express authorization would have been to depart from the focus of civil rights legislation.

As noted, as a practical matter, the §1983-§2283 combination only has real significance where the gravamen of the relief sought in the federal court is protection against the possible effect of a judgment adverse to the plaintiff in the pending state court action. In such cases it is plain that the plaintiff cannot claim to be a genuine class representative. In such situations the nature of the relief sought is alien to the original conception of the Civil Rights Act as a mechanism for the protection groups or classes, which by definition must necessarily extend beyond similarly situated defendants in other state proceedings.

It is respectfully submitted that it is the distortion of the original concept of the Civil Rights Act, implicit in any case where an individual plaintiff or series of plaintiffs seeks particularized relief from pending state prosecution by asserting §1983 as an exception, which has led to the ultimate failure of such plaintiffs to obtain relief in cases where there was no "class" interest implicated (in the absence of some other element such as "irreparable injury" or "extraordinary circumstances").

These conclusions appear to be amply supported by the analysis of the Fourth Circuit in *Baines* v. *City of Danville, supra,* where the court likewise found that §1983 was not an exception to the Anti-Injunction Act. The *Baines* decision is notable as the first instance wherein a federal court of appeals rendered a detailed analysis of §1983 in tandem with §2283. The decision in *Baines* pivoted on a comparison of the nature of the remedy provided for in §1983 contrasted with the judicial limitation imposed by §2283. *Baines* strongly indicates that in a case seeking essentially class relief of the type envisaged in the original Civil Rights Act, there is no collision between the availability of the remedy provided for in §1983 and the jurisdictional limitations imposed by §2283.

In contrast to *Baines,* the single circuit which had previously concluded that §1983 was an exception to §2283 rendered its view without any explanation whatsoever. See *Cooper* v. *Hutchinson, supra.* As *Younger, supra,* makes clear, the reasoning of the *Baines* decision remained unaffected by *Dombrowski* v. *Pfister, supra.*

While relying on the history of the Anti-Injunction Act, as well as principles of comity, the foundation upon which the *Baines* decision rested was the court's analysis of the general jurisdictional grant of §1983 contrasted with the

Anti-Injunction Act's explicit prohibition of the exercise of general equitable jurisdiction in pending state proceedings. The reasoning of the *Baines* court may be capsulized as follows:

> "In strong contrast is the Civil Rights Act. It creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another act of Congress [28 U.S.C. §2823] forbids. The substantive right, in many situations may call for equitable relief, . . . but only by a general jurisdictional grant. Creation of a general equity jurisdiction is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. . . . [T]here is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power for defining the limits of his discretion.
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> • • • •
>
> "If every grant of general equity jurisdiction created an exception to the Anti-Injunction Statute, the statute would be meaningless." *Baines* v. *Danville, supra* at 589.

A number of other courts have adopted the rationale of the *Baines* case. See *Cole* v. *Graybeal,* 313 F. Supp. 48 (W. D. Vir. 1970); *208 Cinema* v. *Vergari,* 298 F. Supp. 1175 (S. D. N. Y. 1969); *Chinn* v. *Johnson,* 294 F. Supp. 909 (S. D. Miss. 1969); *Nichols* v. *Vance,* 293 F. Supp. 680 (S. D. Tex. 1968); *Brooks* v. *Briley,* 274 F. Supp. 538 (D. Tenn. 1967) aff'd *per curiam,* 391 U. S. 361 (1968). See also, Note, "Incompatibility—The Touchstone of Section 2283's Express Authorization Exception", 50 *U. Va. L. Rev.* 1404 (1964).

The Second Circuit has also had occasion to examine the application of §2283 to the authorization of federal injunctions contained in the Securities Exchange Act, 15 U.S.C. §78(u) when the S.E.C. determines that the Act is about to be violated. In *Verntron Corp.* v. *Benjamin*, 440 F. 2d 105 (2d Cir. 1971) *cert.* denied —— U. S. —— (1971) the court found that in spite of the rather explicit provisions for relief in the statute, that the provision contained no reference to §2283 or to injunctive relief against pending state proceedings, and therefore the Securities Exchange Act did not provide an exception to §2283. Since the language in the Securities Act is certainly more explicit than that in 42 U.S.C. §1983, it would appear to follow *a fortiori*, that under this reasoning an exception could not be found to exist under the Civil Rights Act.

In the final analysis a federal court's interference in a pending state prosecution places that court in the role of a reviewing court above the highest court of that particular state. However, this is a power which Congress has reserved to this Court under 28 U.S.C. §1257, and even that power is limited to "final judgments." "The lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coastline, supra,* 398 U. S. at 297. Yet, by allowing a lower federal court to review the action of a state court under the purported Civil Rights exception to the Anti-Injunction Act, that court in effect, arrogates to itself a power which even this Court does not have, namely the power to review an interlocutory order of a state court. See *Younger, supra,* 91 S. Ct. at 755-756 (concurring opinion) (fn).

It should be further noted that after a federal court assumes jurisdiction and then decides to abstain, it may

not be argued that the doctrine of abstention serves as an adequate substitute for the Anti-Injunction Act in Civil Right actions. Once the power to intercede in pending state court proceedings is recognized, some courts will exercise that power even under the most inappropriate of circumstances. See *DeVita* v. *Sills*, *supra*, for an excellent example of the futility and inappropriateness of a federal court's intervention in a pending state court proceeding where the end result was the abstention of the interceding court.

It is significant to note that two exceptions to the Anti-Injunction Act are: (1) where the injunction would be necessary in aid of the jurisdiction of the federal courts; or (2) when the injunction is necessary to protect or effectuate the judgment of a federal court. See §2283. When a state court proceeding is sought to be enjoined this proceeding should be entitled to the same protection of its judgments or of its jurisdiction that is afforded to the federal courts. The courts of the individual states should be allowed to maintain an action already commenced without interruption and thereby accorded the dignity of retaining jurisdiction so as to enter the proper judgment. The argument is unfounded that federally protected rights will be trampled upon if such a procedure is not followed.

In determining whether 42 U.S.C. §1983 constitutes an exception to the Anti-Injunction Act the suggestion of Mr. Justice Black is relevant:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 it-

self implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. *Atlantic Coastline R. Co., supra,* 398 U.S. at 297.

The *amicus* respectfully submits that adherence to this proposition mandates the conclusion that 42 U.S.C. §1983 is not to be considered an exception to the Anti-Injunction Act.

CONCLUSION

For the reasons expressed herein it is respectfully submitted that Title 42 U.S.C. §1983 of the Civil Rights Act does not constitute an exception to the provisions of the Anti-Injunction Act, Title 28 U.S.C. §2283.

Respectfully submitted,

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